VIRGINIA LAW REGISTER

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Perpetuation of Testimony.

The very excellent law which has been upon our statute books since the Code of 1849—now § 3369 of Pollard's Code—which allows testimony to be perpetuated by any person filing a petition before a Commissioner in Chancery and giving notice to take depositions, etc., has a curious omission which should be amended, we think, by our Legislature. The act provides that "the Commissioner shall return a report of his proceedings with the testimony taken by him, to the Clerk's Office of the Court by which he was appointed, and such testimony shall have the same effect as if it had been taken on a bill in chancery to perpetuate testimony. Such Court may make such order as to the costs as may seem to it right."

Now it will be noticed that there is no way by which the fact of taking such testimony may be found on the Court records unless some order is entered as to the costs. The writer happens to know a case in point in which testimony was perpetuated under the statute, the report of the Commissioner with the depositions duly filed in the Clerk's Office and no entry made upon the records, so that it was impossible in the course of a few years for a new Clerk to find the report and testimony. It is suggested that the following amendment would remedy this difficulty:

"And at the first term of the Court after which said Commissioner's report and the depositions are filed in the said Clerk's office, any person interested in the testimony so perpetuated may apply to the Court to have an order entered upon the Chancery Order Books setting out the fact that the testimony was taken in accordance to notice and asking that the papers may be filed amongst the ended chancery causes: and the Clerk of said Court shall enter the said order in the Chancery Order Book of the Court and duly index the same with the name of the person who has perpetuated the testimony as plaintiff and the name of any person to whom notice was given as defendant; and shall file the report, testimony, etc., amongst the ended chancery causes."

Expert Testimony.

The testimony of experts has become one of the stock jokes of the comic papers and one of the burdens, and we might almost say disgraces, of criminal trials. Experts are *retained* by one side or the other of a case and as a general rule give their sworn testimony on the side of the person who retained them. The New York State Bar Association at its thirty-second annual meeting held last month went on record in favor of a bill designed to correct the evils which have grown up about the introduction of expert legal testimony in the courts. The Committee's report was adopted by a large majority, though some members of the Association took widely divergent views of the measure and some contended that it was neither feasible, constitutional nor even proper.

The draft of the bill provides that no expert witness shall be paid or receive as compensation in any given case a sum in excess of the ordinary witness fees unless the court awards a larger sum. A person who shall pay such witness a sum larger than the award shall be guilty of a misdemeanor. The bill further provides that no more than three experts shall be allowed to testify on either side as to the same issue in any given case, except in criminal prosecutions for homicide, or by express permission of the trial court.

> "In criminal cases for homicide where the issues involve expert knowledge or opinion, the court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be fixed by the court and paid by the county where indictment was found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury. This provision shall not preclude either prosecution or defense from using other expert witnesses at the trial."

It is specified that the bill is not intended to apply to "witnesses testifying to the established facts or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion."

> "It is apparent to all," says the committee report, "that theoretically an expert is a scientist interested solely in facts, who

should retain freedom of judgment and liberty of speech, and should be free from embarrassment of any personal relations to or with the parties to an action. That when he speaks he should do so judicially, as the representative of the special branch of science which he invokes, governed by the opinion of the great body of scientists in this relation, and in accord with their most recent investigations. That he should at all times be treated with respect and should have the protection of the court. That no one should be permitted to distort, pervert or misrepresent his testimony.

"It is within the power of judges at Nisi Prius, to require a greater degree of competence upon the part of persons claiming to be experts by the simple but ineffectual method of defining to a jury with force and precision the distinction between a witness proved to be thoroughly qualified to speak upon the subject regarding which his testimony is offered and one whose claim to speak is predicated principally upon the fact that he is paid to do so.

"If trial Judges will pursue this course and are sustained in so doing by the Appellate Bench, courts of justice will be rid of corrupt and worthless so-called experts, provided the judges themselves are animated solely by a wish to see justice promptly administered.

"Nor is the bar blameless. Not only do some of its members connive at the hiring of corrupt and incompetent so-called experts but they artfully and selfishly cultivate, and are largely responsible for the fallacy that a witness is to be discredited if he can be disconcerted ("rattled"). Thus the art of cross-examination, so potent for good when fairly and properly used, plays havoc with hard-earned and well-deserved reputations in the hands of lawyers whose sole ambition is to win. Scientific opinion, to be of controlling value, can be given only under conditions of mental repose."

It seems to us that the purpose of the act is a wise one and we would like to see an act of the same sort passed in the State of Virginia.

The Admissibility of Testimony of Witness on Second Trial of a Criminal Case Who Had Died between the Trials.

It is a subject of congratulation that the question of the admissibility on the occasion of a second trial of a criminal case, of the testimony of a witness who had died after giving testimony in a previous trial, has been at last settled, and settled, we think, in accordance with the right and justice of the matter. In Parks *v.* Commonwealth, decided January 1st, 1909, 2nd Va. Appeals 903, Whittle, Judge, delivering the opinion of the Court, decides that in criminal, as in civil cases, the testimony of a witness who gave evidence at a former trial and was cross-examined by the Commonwealth's Attorney, but who died prior to the second trial of the case, may be proved. The Court very well says that it "would present an anomalous state of the law to admit such evidence in civil cases involving property rights merely and to apply the rule of exclusion in criminal cases involving life and liberty.

This question was once before the Court in Montgomery's case, reported in 99th Va., page 833, but no allusion will be found to the point in the opinion in 99th Virginia. In that opinion, which was rendered by Judge Phlegar, as reported in 37 Southeastern Reporter, page 841, the Court held the exact opposite of what is now decided in Parks' case, but this portion of its opinion was stricken out of the official report, showing evidently that the Court upon maturer reflection did not wish the question decided, it probably being unnecessary as far as Montgomery's case was concerned. As it might mislead those who examine the Southeastern Reporter, we think it best to refer to Montgomery's case in connection with that volume and to show that the law is now settled in this State contrariwise to the opinion of the Court as given in 37 Southeastern Reporter. The Court in its opinion in Parks' case refers to VIRGINIA LAW REGISTER, vol. 2, page 807. In the August and November numbers of the REGISTER, 1906, vol. 12, p.323, editorally, and 515, in a leading article, we refer to this question, and in the same volume, page 755, Mr. W. R. Staples also writes an interesting article on the subject. We are glad to find that Parks' case takes the same view that was taken in all three of these articles.

Recovery upon an Agreement Held to Be Illegal under the Anti-Trust Act of 1890 Denied.

The decision of the supreme court of the United States in Continental Wall Paper Co. *v.* Voight Sons & Co., decided February 1, 1909, has been heralded by the newspapers as a death blow to trusts. The way in which the papers have reported that decision might very well give rise to that idea; but an inspection of the opinion of the court shows that such is not the case. The opinion of Judge Harlan who spoke for a bare majority of the court reaffirms the doctrine of Connelly *v.* Union Sewer Pipe Co., 184 U. S. p. 540 in which the court decided that a voluntary purchaser of goods at a stipulated price under a collateral, independent contract, cannot escape an obligation to pay for them upon the ground *merely* that the seller which owned the goods was an illegal combination or trust. In the Continental Wall Paper Case the account sued upon was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. The case before the court was in brief upon a demurrer to the defendant's plea. That demurrer admitted that the plaintiff was an illegal combination whose operations restrain and monopolize commerce and trade amongst the states, and that an agreement which constituted that combination and which lay at the foundation of the dealings between the parties, proposed to accomplish forbidden ends. That the defendants were compelled to sign another agreement, which had reference in fact—though not in term—to the illegal combination agreement, and that under the agreement so signed the defendants were compelled to buy their entire supply of wall paper from the plaintiff and not to sell except at prices which should not be lower or upon more favorable terms than those fixed in a schedule attached to the agreement. The court denied relief under these circumstances not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. "It is of no consequence," says Harlan, J., "that the present defendant company had knowledge of the alleged illegal combination and its plans or was di-

rectly or indirectly a party thereto." Mr. Justice Holmes with Brewer, Peckham and White concurring, dissents and says "this decision must mean that Connelly *v.* Union Sewer Pipe Co., ought to have been decided the other way. There, as here, there was or was assumed to be an illegal trust. In furtherance of the purposes of the trust a general agreement was made between the trust and the defendants, the purchasers, which required defendants to buy from the plaintiff alone at prices alleged to be unreasonable, they receiving a rebate upon that consideration and which fixed a price at which the defendants would sell. There was just as much of a scheme and just the same scheme in that case as in this. In both the defendants co-operated as victims to the monopoly in precisely the same way. The facts spoke for themselves and were the same."

It is rather hard to differentiate between the two cases, but the demurrer in the Continental case seems to have made its case not worth a "continental." At the same time it is apparent that the decision is not one of the great value the newspapers have placed upon it. It is not likely to create a precedent.

Election of Judges by Popular Vote.

It always hurts to have disagreeable facts related of us, especially when it comes from outsiders. But an unusual amount of truth concerning the manner of choosing the judges in some of the United States is contained in an editorial in the *London Law Journal* entitled "Lawlessness in America." The conclusion is reached that much of our lawlessness is traceable to the fact that the practice of electing judges by popular vote has resulted in a corrupt judiciary in many cases. We do not wholly indorse this, though there is much truth in what he says. A judge should never be placed under any obligations to a constituency. The editor of the *Journal* says:

> "The Principal of Harvard University has been complaining recently of the lawless spirit which receives many diverse but equally serious manifestations in the United States. Laws are flagrantly violated, the decisions of the Courts are treated with scorn, the punishment of crime is frequently

taken by the populace into their own hands, and what, it is said, is in some ways the worst feature of all, lawyers abuse their talents and their knowledge by helping individuals and corporations to evade the law. It is remarkable that a country which is imbued with so many English characteristics, and which shares with us the splendid heritage of the Common Law, should not at the same time have accepted more completely the 'Rule of Law' which is one of the great characteristics of the English people. Partly, no doubt, the difference in the American character is due to the introduction into the population of many mixed elements brought up with different traditions; partly, too, the provisions of the Federal Constitution render the State Law less certain, and therefore less binding on the conscience of the citizen, than the laws passed by the Parliament of the United Kingdom are upon all the populations for which it legislates. But there is one cause not usually noticed which, while it may not directly affect the general condition of the people, goes far to account for the mischievous influence of the lawyer class as we find it in the States. The American judges are not, like the English Bench, selected from the leaders of the Bar, but they are elected by popular vote or appointed by political parties; and this not only impairs the weight of judicial decisions, but reacts mischievously upon the whole tone of the profession. In England almost every barrister of standing aspires to be a judge, and it is with a consciousness of this end that he frames his whole bearing towards his client and the Court. He must act throughout his career so as to make himself fit to hold the position which he hopes will crown it. He will always show respect for the law, and he would scorn to bring it into disesteem. But the American lawyer is otherwise placed. Unless he adds the arts of the demagogue, professional ability alone is unlikely to raise him to a judicial post; and he may be more certain to secure not only professional success but political advancement if he puts his talents at the service of some powerful interest than if he plays merely a creditable part in the Courts. Hence he frequently works for his client without regard to the spirit or science of the law. The close connection of the Bar and Bench in England makes for the general respect for law, as well as for the regard paid to judicial authority. Their severance in America increases the general contempt for both."

Litigants are entitled to submit their causes to a tribunal free from prejudice and bias and whose integrity is above suspicion. Not only this, but a judge is entitled to avoid unnecessary and

embarrassing positions in which his reputation for judicial fairness may be subject to unjust criticism. Though political prejudice or bias is no objection to a judge, yet it has been the prolific source of injustice and wrong, and even cruelty, from time immemorial, and always will be until the people adopt some way of selecting their judicial officers independent of their party affiliations and freed from party obligations. Judges of courts of final resort should enjoy the approbation of the whole people without regard to party lines, and under no circumstances should they be offensively partisan. Private citizenship is preferable to a judgeship hampered with the lack of public confidence in the ability, integrity or legal acumen of the incumbent.

Taxation without Representation.

In Eggborn v. Board of Supervisors of Culpeper County, 63 S. E. 424, the court, in a note appended to that case, raises a question as to the constitutionality of an act approved February, 1908, "to provide for the issuing of county bonds for permanent road improvements in the magisterial districts of the counties of the state." Since several of the counties in the state have already voted on the question of issuing bonds for road improvement under this section, and as a number of others are preparing to do so, the grave importance of this question becomes apparent. Section 2 of the Act contains this clause: "The judges of Election at the several voting precincts shall, immediately after the closing of the polls at each of the said places, count the ballots deposited and shall, within two days after said election, make returns thereof as provided in other elections, provided that no voter shall be allowed to vote in said election who resides and is a voter in a town exempt from road tax." Section 7 of the Act provides as follows: "After issuing such bonds, or any of them, when next levy is made, or tax imposed, in said County, a tax shall be levied on all of the property liable to State tax in said Magisterial District in which the proceeds of the bonds have been, or are to be expended, to pay the interest on the bonds so issued, and to create a sinking fund to redeem the principal thereof at maturity, etc." Section 6 of the Bill of Rights provides as follows: "Section 6. Elections to Be Free.—That all

elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good."

Our learned correspondent in the January number of the LAW REGISTER, after quoting these provisions, says: "The question is, has the Legislature the constitutional right to delegate to a part of the voters of a District the question of borrowing money and issuing bonds to secure the same, and, at the same time, provide that, if the election is in favor of the bond issue, the property in the whole District shall be taxed to pay the same? Is not this taxation without representation?"

To our mind there is a serious doubt whether from any view point this provision can be upheld, unless the courts will make a liberal application of the rules governing the constitutionality of statutes. Some of these rules are as follows: There is a presumption in favor of the constitutionality of a statute, and in accordance therewith, when a statute is susceptible of two constructions, one of which supports the act and gives it effect and the other renders it unconstitutional and void, the former will be adopted, even though the latter may be the more natural interpretation of the language used. If doubt exists as to the constitutionality of the statute, the benefit of the doubt is to be given to the law. The doubt may arise as to the true meaning of the constitution or as to whether the statute is in conformity with its provisions. A restricted construction of a statute should be adopted where one more board would bring the statute in conflict with the constitution; and, on the other hand, if a restricted construction would reduce the statute to a nullity, as being in contravention of the fundamental law, courts will favor a broader interpretation. When a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the

latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution. Courts may resort to implication to sustain a statute, but not to destroy it. A forced construction, however, will not be resorted to to sustain the constitutionality of a statute. If the language will not support any construction consistent with the constitution, it is the duty of the court to declare the statute void. That construction of a statute which attributes to the legislature the exercise of a doubtful power, will not, in the absence of direct words, be readily adopted.

Now under these rules of construction it is possible to sustain this section, should the court read the phrase "liable to state tax" in § 7 in light of § 2 of the same act and confine those terms to property subject to the road tax from which the complainants in the bill for injunction are expressly exempted. But in a well considered Illinois case (Burr *v.* City of Carbondale, 76 Ill. 455) quite similar to the one under discussion, it was held that where a law authorized the imposition of a tax in a county, without any vote of the people, to aid the state in establishing a state institution therein, and the taxable property of such county was also required to bear its proportion of taxation equally with that in the other counties as to the residue of the cost, the first tax was compulsory taxation under the general power to tax, and in violation of the constitutional provision requiring such taxation to be equal and uniform.

In other words, as the court said, the taxables of the county had no voice in the matter, but were taxed to provide for the payment of the principal and interest of the subscription to the issue. The bonds were issued to aid the Southern Illinois University. Since the days of the Boston Tea Party, our people have been justly sensitive to any attempt at taxation without representation, and this statute would seem to come as near to it as any that has ever come under our notice.